IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 741 of 1995

1. Baban Shivram Jadhav
2. Shrirang Shivram Jdhav ..Appellants

(Orig.defendants)

V/s

Harishchandra Dnyandeo Shinde..Respondent

(Orig.plaintiff)

Shri A.A.Kumbhakoni for Appellants

Shri A.V.Anturkar for Respondent

CORAM:S.R.SATHE,J.

DATED:26th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of 4th Additional District Judge, Solaur in Civil Appeal No.391 of 1993 whereby the order passed by the Court of the Civil Judge,J.D., Karmala in Regular civil suit NO.143 of 1985 permanently restraining the defendants from

obstructing the plaintiff using the cart way and taking canal water from the western side of bund of gat no.342 was confirmed and the appeal was dismissed, the original defendants have preferred this second appeal .

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to this appeal are as under :

4. The suit land described in detail in para 1 of the plaint i.e. survey no.347 northern portion is owned and possessed by the plaintiff. The defendant no.1 is the owner of the land bearing Block No.348 which is to the South of 347. There is east west road going across defendant no.1’s land bearing block No.348 and beyond that towards South there is a land bearing No.342 which is owned by the defendant no.2. According to the plaintiff there was a water canal running south north from the western corner of defendant’s land bearing block no.348. So also by the south of the said canal there was south north cart track. The plaintiff was using the said cart track as well as the water

course continuously for a period of more than 20 years. However, in the year 1980 the defendants obstructed plaintiff from taking water through the said canal by passing through the cart track. Plaintiff therefore filed Suit No.208 of 1980. The said suit was decreed in favour of the plaintiff. However, the defendants preferred Regular Civil Appeal No.489 of 1982. It was found that there was some technical difficulty and the plaintiff sought permission to withdraw the suit and to file fresh suit on the same cause of action. Accordingly, the order was passed and plaintiff withdrew the said suit. However, even thereafter the defendants started obstructing plaintiff's enjoyment of the said water drain and hence on 8-8-1985 the plaintiff filed Regular Civil Suit NO.143 of 1985 for declaration that he has acquired easementry right in respect of taking water and cart way, i.e. access to his field from the western side of bund of Gat NO.342 i.e. defendant's property. Plaintiff also prayed for permanent injunction restraining the defendants from obstructing the plaintiff's vahiwat of the said cart way and taking water from the said water drain. By virtue of amendment the plaintiff also alleged that some portion of original survey no.159/2 was sold by the plaintiff's father to the defendant and at that time the cart way and water

drain were as it is. The plaintiff therefore alleged that he has a right to use the said cart way and water course.

5. The defendant filed his written statement at Exh.41 and resisted the suit claim. They contended that the plaintiff was not the owner of the suit land and the land in question was not in his possession but the same has been leased out by him. The defendant further contended that there was no cart way or water drain as alleged by the plaintiff and plaintiff are not having any right to take water through the alleged water drain. The defendants further contended that in view of the fact that the plaintiffs had withdrawn the earlier suit the present suit is not maintainable. They also contended that the plaintiff's suit for declaration is time barred and prayed for dismissal of the suit.

6. On these pleadings the trial Court framed issues at Exh.43. After considering the evidence adduced by both the parties the trial Court came to the conclusion that though the plaintiff had alleged that he was having a right of easement by prescription, in fact no such right is established by the plaintiff. He also held that right that is claimed by the plaintiff is in fact on the basis of

"right of easement by necessity". He also observed that the defendants have obstructed the plaintiff's wahiwat of the suit way and water drain in question. Hence, decree for permanent injunction was passed in favour of the plaintiff.

7. Being aggrieved by the same, the defendants filed Civil Appeal No.391 of 1993. As the said appeal was also dismissed the defendants filed present second appeal.

8. From the perusal of record it appears that at the time of admission of this appeal on 17-4-1997 the Court has passed the following order.

> "The substantial question of law as in grounds 1 and 2 requires consideration. Admit".

Grounds 1 and 2 read as under :-

"1. When the plaintiff had come out with a specific case in no uncertain terms that he has right to use the disputed way and water canal as an easement acquainted by way of prescription, and when plaintiff had according sought a declaration as main relief in the suit, whether the court below were

justified in granting him only consequential relief of injunction on the basis that plaintiff has made out a case of acquisition of easementry right by way of necessity (which was not the case at all) especially even after holding that plaintiff could not have acquired any right of easement by prescription and after refusing to grant any such declaration?

2. Whether without there being any pleading whatsoever in the plaint and consequently without giving an opportunity to the defendant to meet any such case, the courts below could have granted relief to the plaintiff, making out a case on their own of easement of necessity"?

9. In this appeal before me, Shri Kumbhakoni, learned Advocate for the defendants has urged only two points. Firstly, he submitted that the plaintiff had come out with a case that he has acquired right of way and water by prescription. However the said right of way was obstructed by the defendants. The first appellate Court though observed that the plaintiff has not proved right of prescription, decree for perpetual injunction was passed in favour of the plaintiff holding that the plaintiff is having a right of easement by

necessity. Secondly, he argued before me that without giving any opportunity to the defendant perpetual injunction was granted against the defendant holding that the plaintiff has acquired right by necessity. He therefore submitted that order passed by the first appellate Court is not legal and correct. As against this the learned advocate for the Respondent Mr.Anturkar submitted that from perusal of the pleadings it can be said that the plaintiff had averred easement by necessity. He also submitted that by virtue of amendment in the plaint the defendants had specifically averred that he is having a right of way and right to take water through the drain and as such it cannot be said that the court has granted relief which was not claimed for.

10. It is not in dispute that block No.347 and 348 were initially the part and parcel of the old Survey NO.159/2 which was owned by the plaintiff's father Dnyandeo Shinde. It is also an admitted fact that the defendant no.1 purchased land bearing block 348 under 4 sale deeds. First one was of the year 1969. Thus admittedly plaintiff was the owner of the land bearing block No.347 till the year 1969. The suit way and the water course are forming part and parcel of block no.347. It is subsequently alienated to

the defendant no.1. The earlier suit was filed in the year 19080 while the present suit is in the year 1985. In order to establish the right of easement there must be enjoyment from this property for continues period of 20 years. In the instant case when the plaintiff himself was the owner of the land in question in the year 1969 and 20 years had not even lapsed when the present suit was filed, it cannot be said that the plaintiff has acquired any right by way of prescription. Both the courts below therefore rightly observed that there was no question of plaintiff's acquiring any easementry right by prescription. From the perusal of the judgment of the trial Court as well as the first appellate Court it appears that both the Courts have observed that there is a right of way by necessity as per provisions of Section 13 of Easements Act. It does appear that all ingredients of Section 13 of Easement Act are fulfilled in the instant case. But main objection of the learned advocate for the defendant is that the plaintiff had not at all made out any pleadings regarding right to easement by necessity. It is therefore, necessary to carefully see the averments in the plaint. From perusal of the same it does appear that the plaintiff has no where specifically stated that he is having right of easement by necessity. However, if we take into

consideration the amended portion of the plaint wherein he has specifically stated that his father sold some portion of Survey No.139/2 i.e. southern portion of the existing block no.348 to the plaintiff by virtue of registered sale deed dated 10-3-1969 and in that sale deed the cart way and the water course have been mentioned and it was agreed to keep the said cart way and water course as it is. Thereby it has been suggested that for reaching to the land of plaintiff it was necessary to utilise the way in question though it was forming part and parcel of the land which was subsequently sold to the defendant. Thus plaintiff has definitely averred that he is having a right to utilise the way in question and the said right is received or acquired by virtue of the averment in the sale deed. So, ultimately the main question which was to be decided by the trial Court as well as the first appellate court was whether the plaintiff had a right to use the way and water course in question and whether the defendants were entitled to obstruct the plaintiff’s enjoyment of the said rights.

11. Relying on the case of Narayana Balthilaya V/s Venkatesha Balthilaya reported in AIR 1969 Mysore 6 - the learned Advocate for the defendant argued before me that right to take water along with an

artificial water course running over the land of another property is not a natural right of the property but could be acquired either under a contract or by prescription which presumes a grant. In the instant case there are no pleadings of the plaintiff regarding grant or necessity and hence the first appellate court's order is not legal and correct. The ratio of the above cited rulings is not disputed. However, in the instant case I have already pointed out that the plaintiff has specifically averred that he is having a right to use the way and water course in question and the said right comes from the sale deed which has been executed by his father in favour of the defendant. It is therefore necessary to see what is relevant averment in the said sale deed. It is an admitted fact that the plaintiff's father has sold the land bearing block no.348, southern portion, to the defendants on 10-3-1969. However, it is the contention of the defendants that the plaintiffs have failed to prove the said sale deed. It appears that certified photocopy of the said sale deed is produced by the plaintiff at Exh.114.It was tried to be argued on behalf of the defendant that contents of the said certified copy are not proved by the plaintiffs. However, it must be noted that the plaintiff has stated that the original sale deed is

with the defendant. Defendant was given notice to produce the same but he failed and as such secondary evidence viz. photo copy was admitted in evidence. The plaintiff as well as plaintiff's witness have stated that such sale deed has been executed and plaintiff's father has signed the same and there is mention about the right to way and right to water course. So I think that the trial Court as well as the first appellate court rightly held that averments in the said deed Exh.114 are proved by the plaintiffs and the same are sufficient to establish that the plaintiff is having a right of way and right to water through the canal situated in defendants land by the side of western bandh.

12. Once it is held that the plaintiff has established the alleged right of way and right to take water through the drain in question and proved that the defendants obstructed him for enjoyment of the said right the Courts below were right in decreeing the suit for permanent injunction in favour of the plaintiff. In the circumstances, merely because the relief of declaration was not granted in favour of the plaintiff it cannot be said that the order regarding permanent injunction is illlegal. When it appears from the record that the plaintiff is having existing right in respect of the

said way and suit water course, there is no necessity to grant any declaration in that behalf and as he has established the said right, decree for permanent injunction is legal and correct.

13. In this view of the matter I have no hesitation to hold that the order passe by the first appellate Court is legal and correct and there is no necessity to interfere with the same. Hence the appeal is dismissed with costs.

(S.R.SATHE,J)